Supreme Court, U. S.
FILED
JUL 11 1972
MICHAEL RODAK, JR., CLERK

72-5

In the
Supreme Court of the
United States

October Term, 1971

No.

FRANK F. MURCH, et al.,
Petitioners,

v.

ROBERT H. MOTTRAM,
Respondent.

PETITION FOR A WRIT OF
CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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RESPONSE NOT PRINTED

INDEX

Page

Opinions Below.....2

Jurisdiction.....2

Questions Presented.....3

Statement.....4

Reasons for Granting the Writ.....9

Conclusion.....16

Appendix.....1

1. Opinion of Court of Appeals.....1

2. Post-Conviction Statute (14 M.R.S.A. § 5502 and § 5507).....8

CITATIONS

CASES

Case v. Nebraska (1964), 381 U.S. 336.....11

Griffin v. California, 380 U.S. 609.....15

Mottram v. Murch, et al. (D.C., Me. 1971) 330 F. Suppl. 51.....2

Mottram v. State of Maine (Me., 1970), 263 A.2d 715.....2

Spencer v. Nebraska (1967),
385 U.S. 554..... 8

State v. Mottram (1962),
158 Me. 325, 184 A.2d 225..7

Young v. Ragen, 337 U.S.
235.....11

STATUTES

28 U.S.C. § 1254(1).....1

14 M.R.S.A. § 5502.....4

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ROBERT H. MOTTRAM
Respondent

PETITIONER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners* pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in this proceeding on April 12, 1972.

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* Sheriff Murch and State Probation and Parole Board

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix to this Petition. The opinion of the District Court is reported in Mottram v. Murch, et al (D.C., Me., 1971), 330 F. Supp. 51. The opinion of the Maine Supreme Judicial Court is reported in Mottram v. State of Maine (Me., 1970), 263 A.2d 715.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on April 12, 1972. A stay of mandate has been granted by the Circuit Court. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. When a State Court has decided that a State prisoner's attack of procedures leading to revocation of parole was a State post-conviction proceeding, does not a Federal Court of Appeals err in ruling that the State action was not a State post-conviction case?

2. Did not the Court of Appeals err in finding that although the State could have simultaneously tried both counts of an indictment alleging larceny and recidivism, prejudice resulted at separate trials when 4 jurors who sat on the larceny charge also sat on the recidivist charge and heard the defendant invoke the Fifth Amentment in the first trial?

STATEMENT

This case originated in the District Court, on Mottram's application for Habeas Corpus relief, after the Maine Supreme Judicial Court declined post-conviction relief in Mottram v. State, et al. (Me. 1970), 263 A.2d 715.

In 1965, Mottram filed a state court petition under 14 M.R.S.A. § 5502* attacking his conviction. At the hearing before the single justice, however, at which time Mottram and his attorney were present, counsel requested permission to withdraw the original petition and to proceed on a "supplemental" petition attacking solely the procedures leading to the revocation of his parole. Although the post-conviction statute itself provided adequate warning of the risk of

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* See Appendix, p. 8-9 .

STATEMENT

This case originated in the District

Court [illegible] Motteram's application [illegible]

[illegible] relief, after the state

[illegible] Judicial Power doctrine pre-

[illegible] relief in Boyle v. [illegible]

[illegible] the [illegible] Rule 11[illegible]

petition under 14 U.S.C.A. § 2302*

attacking his conviction. At the hear-

ing before the single Justice, however,

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procedures leading to the convocation

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tion styled itself [illegible]

[illegible] writing of the clerk of

* See Appendix, p. 6-9.

waiver, the justice pointed out to petitioner and his counsel that the petition was one for statutory post-conviction, requiring petitioner to include every claim of error of which he was aware; and that failure to allege such claims might constitute waiver. After discussion between Mottram and his counsel, they decided to go forward only on the "supplemental" petition; expressing their view the suit was not a post-conviction action. On appeal, the Supreme Judicial Court of Maine concurred with the presiding justice's view that the "supplemental" petition was one for statutory post-conviction relief. Mottram v. State (Me. 1967), 232 A.2d 809, 818. The District Court concurred with that State decisional law. The Court of Appeals, in reversing the District

Court, declared that Mottram's 1965 "supplemental" petition was not an attack upon his conviction and sentence. (Appendix to Petition, p. 4.)

Alternatively, the District Court ruled against Mottram on the merits of his claim that he was denied due process of law, when convicted in the State Court on a two-count indictment charging: (1) larceny of a car in 1957; and (2) habitual offender, by virtue of a 1952 conviction for auto theft. Mottram's motion for separate trials was granted. At the trial on the first count, Mottram took the stand and testified in defense to the alleged 1957 theft. On cross-examination he was asked, presumably for impeachment, about his prior convictions. He acknowledged certain prior convictions except for the 1952 conviction; as to

that one, he pleaded the Fifth Amendment on advice of counsel. At that point, the State attorney did not press his question, nor did he comment on Mottram's refusal to answer. The jury returned a guilty verdict late in the afternoon. The Court then sought to impanel a jury to try the recidivist count. There was a shortage of new jurors and to complete the panel the Court, over Mottram's objection, impaneled 4 jurors who had sat on the trial of the first count. Mottram did not take the stand in the second trial. Following conviction on the second count, an appeal of both convictions was taken without success. State v. Mottram (1962), 158 Me. 325, 184 A.2d 225. Mottram did not raise the matter of the repeating jurors in that appeal. The District Court ruled

that Spencer v. Texas (1967) 385 U.S. 554 controlled, and that in any event, Mottram was not prejudiced because he did not answer the question asked of him at his first trial concerning the 1952 conviction, and the four jurors could no more infer guilt from his invocation of the Fifth Amendment at his first trial than from his failure to testify at his second trial. The Court of Appeals reversed the District Court, going beyond Spencer v. Texas, and declaring that allowing four jurors to sit on both trials "created a likelihood of prejudice." (Appendix to Petition, p. 6.)

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has wrongfully limited the State's application of its post-conviction statute.

The Court of Appeals decided that Mottram's 1965 State petition attacking the procedure leading to the revocation of his parole was reasonably interpreted by Mottram's counsel as being other than a post-conviction action. (Appendix to Petition, p. 4) That decision conflicts with the ruling of the presiding justice having jurisdiction of the petition, who pointed out to Mottram and his counsel the case was a statutory post-conviction case. Too, the decision of the Court of Appeals conflicts with the State decisional law describing Mottram's petition as a post-conviction proceeding. Mottram v. State (Me., 1967), 232 A.2d 809, 818. Of equal

significance is the fact that the Court of Appeals has altered the District Court's concurring interpretation that the 1965 petition was a post-conviction action. The Court of Appeals decision makes Maine's post-conviction statute applicable according to the interpretation petitioner's counsel gave to the pleadings. That places Maine with an unworkable and wrongful limitation upon its statute. Either a case is a post-conviction case, according to decisional law, or it is not. The Court of Appeals has no authority to rest statutory interpretation of a state law upon petitioner's counsel, and for that reason, the Writ should be granted.

2. The purposes served by State post-conviction statutes, recognized in Case v. Nebraska, are undermined by the Court of Appeals.

In 1949, this Court set forth the principle that states must afford prisoners some clearly defined method by which they may raise claims of denial of federal rights. Young v. Ragen, 337 U S. 235. Maine has had post-conviction procedures available to State prisoners for many years. At the time Case v. Nebraska (1964), 381 U.S. 336, was decided, Maine was one of seven states with such procedures. (Id., p. 338, footnote #3) Case v. Nebraska, supra, expressed concern over the lack of effective post-conviction remedies in the states. Mr. Justice Clark noted in a concurring opinion that:

> "I hope that the various States will follow the lead of Illinois, Nebraska, Maryland, North Carolina, Maine, and Wyoming in providing this modern procedure for testing federal claims in the state courts and thus relieve the federal courts of this ever-increasing burden." (Id., p. 340, emphasis mine.)

Ironically, the Court of Appeals has narrowed the application of Maine's post-conviction statute, against the State's interest, and against the spirit expressed in Case v. Nebraska. The State of Maine has a legitimate interest in the subject-matter definition of its post-conviction statute; to give its statute broad scope. If the decision of the Court of Appeals in this case is not reviewed, then the conflict it creates in fact will prejudice the principles existing by reason of Case v. Nebraska. If,

as was stated by Mr. Justice Brennan in Case v. Nebraska, at page 347,

> " * * * Every consideration of federalism supports our conclusion to afford the Nebraska courts the opportunity to say whether that process is available for the hearing and determination of petitioner's claim.

then surely the Court of Appeals erred in revoking Maine's opportunity to interpret its post-conviction statute in the present case. Note that the quoted language gives the "opportunity" of interpretation to the courts; not to petitioners' counsel.

3. With respect to the repeating jurors matter, the Court of Appeals declined to follow Spencer v. Texas.

The District Court applied Spencer v. Texas, 385 U.S. 554 (1967) to the merits of this case concerning the repeating jurors matter. That case held that a single trial, before the same jury, of the substantive and habitual offender counts in an indictment, does not violate due process. The District Court reasoned that the principle in Spencer v. Texas was applicable in this case, but that in any event, even if Spencer was not the rule, Mottram was not prejudiced at the trial of the recidivist count because he did not answer the question asked of him at the first trial concerning the 1962 conviction; and the four jurors could no more infer guilt from such failure to answer at

the first trial than from his failure to testify at the second trial. The Court of Appeals went beyond Spencer v. Texas, but did so on the basis that there was a "likelihood of prejudice" and a "possibility of prejudice" in the matter. The Court of Appeals declined to follow Spencer v. Texas without first showing a presence of prejudice. The Writ should issue to review that departure from applicable decisional law. The Court of Appeals was critical of the District Court's reliance upon yet another significant case on the subject: Griffin v. California, 380 U.S. 609. Petitioners believe the decision of the Court of Appeals should be reviewed due to its contention that a possibility of prejudice makes both Spencer and Griffin inapplicable to the repeating jurors matter.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

John W. Benoit, Jr.

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Dated: June 29, 1972.

United States Court of Appeals
For the First Circuit

No. 71-1387

ROBERT H. MOTTRAM,

PETITIONER, APPELLANT,

v.

FRANK F. MURCH, ET AL.,

RESPONDENTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

S. Mason Pratt, Jr., with whom *Pierce, Atwood, Scribner, Allen & McKusick* was on brief, for appellant.

John W. Benoit, Jr., Deputy Attorney General, for appellees.

April 12, 1972

ALDRICH, *Chief Judge*. Petitioner Mottram in 1958 was indicted in the state court on two counts: one for stealing a car in 1957, and secondly for being an habitual offender by virtue of a prior felony conviction. 15 Me.Rev.Stat. § 1742. Although in fact he had several prior convictions, the only one alleged in the indictment was a 1952 conviction for automobile theft. Petitioner pleaded not guilty, and after a false start[1] the court granted his motion for separate trials. At the trial on the first count he took the stand and testified

[1] Initially petitioner was convicted on both counts in a single trial, and his convictions were affirmed on appeal. *State* v. *Mottram*, 1959, 155 Me. 394, 156 A.2d 383. However, the Superior Court thereafter granted a new trial for prosecutorial misconduct.

with respect to the alleged 1957 theft that the owner had loaned him the car. On cross-examination he was asked, presumably for purposes of impeachment, about his prior convictions. He acknowledged the others, but when asked whether he had been convicted in 1952 of stealing a car, on advice of counsel he pleaded the Fifth Amendment. The jury returned a verdict of guilty. The court then sought to empanel a jury to try the recidivist count. There was a shortage of new jurors and to complete the panel the court, over petitioner's objection, called four jurors who had sat on the trial of the first count. On this occasion petitioner did not take the stand. The jury found him guilty, and the convictions were affirmed on appeal. *State* v. *Mottram*, 1962, 158 Me. 325, 184 A.2d 225. Thereafter he sought a writ of coram nobis, but was met with a decision that he had adopted the wrong procedure. *Mottram* v. *State*, 1964, 160 Me. 145, 200 A.2d 210. On neither of these occasions did petitioner seek to argue the matter of the repeating jurors.

Petitioner was subsequently released on parole, but he was shortly returned as a parole violator. He sought to attack the method as lacking in due process. For some reason not disclosed—counsel is now deceased—his petition contained two complaints about matters occurring during the trial itself. Counsel received permission to strike these, but the court informed counsel, and petitioner personally, that in view of 14 Me.Rev.Stat.[Ann.] § 5507[2] it felt petitioner must make his whole case at once and not piecemeal. Counsel expressed disagreement. Petitioner elected to press only his complaint as to the parole procedure. This he ultimately lost. *Mottram* v. *State*, Me., 1967, 232 A.2d 809. In the mean-

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[2] "All grounds for relief claimed by a petitioner under this remedy must be raised by a petitioner in his original or amended petition, and any grounds not so raised are waived unless the State or Federal Constitution otherwise requires or any justice on considering a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition." (14 Me.Rev. Stat.[Ann.] § 5507)

question but that section 5507, n.2 ante, is an orderly state procedure, serving a useful and proper purpose.[3] There are a great many instances where a party must be bound by a mistake of his counsel, and we would feel obliged to hold in this case that if counsel's advice was unreasonable petitioner could not rely upon it to avoid a finding of "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 1938, 304 U.S. 458, 464, or a deliberate bypass of orderly state procedures.[4] *Fay* v. *Noia*, ante at 438-39; *see Henry* v. *Mississippi*, 1965, 379 U.S. 443, 447.

However, although we of course bow to the Maine court's ultimate interpretation of its statute, we cannot think that counsel's belief that it would not reach that result was an unreasonable one. Section 5502 does not speak in terms of all common law remedies for illegal procedures and illegal confinement. On the contrary, as the court stated in *Mottram*, 263 A.2d at 719, and again at 721, the statute was addressed to "attacks on a conviction." The exact statutory language is "common law remedies . . . for challenging the validity of a conviction and sentence." Section 5507, in turn, is tied in with section 5502. In attacking the procedures leading to the revocation of his parole, petitioner was not attacking his conviction or sentence—whether he had violated his parole was an independent matter. The court in *Mottram* cited *Longway* v. *State*, 1965, 161 Me. 430, 213 A.2d 519, as supporting its result. It had there held, in connec-

[3] "In order to prevent harassment of the courts and a piecemeal presentation of asserted grounds of relief, the statute imposes the very reasonable requirement that if multiple petitions are presented, some reason or reasonable excuse be offered for failure to assert present grounds in an earlier petition." *Nadeau* v. *State*, Me., 1967, 232 A.2d 82, 84.

[4] Those who, relying on *Johnson* v. *Zerbst*, ante at 468-69, would place the burden as to deliberate bypass on the petitioner, *e.g.*, *Sandoval* v. *Tinsley*, 10 Cir., 1964, 338 F.2d 48, 50, mistakenly extend the presumption of regularity there attached to district court judgments to state court determinations of waiver. Since the issue of waiver of a federal right is a federal question to be independently resolved by the federal courts, *Fay* v. *Noia*, ante at 439, no such presumption can attach.

tion with a prosecution for escape, that the validity of the conviction the defendant was serving was not at issue. With great deference we cannot think that knowledge of this decision must lead counsel to believe that the validity of the conviction would be at issue when the violation of parole was under consideration.

In the absence of extrinsic evidence that petitioner was not acting in good faith reliance on counsel's opinion, but rather was seeking to circumvent state procedures (it appearing clearly from the record that he did not intend to abandon his rights), *see Fay* v. *Noia*, ante at 438-41, *see generally* The Supreme Court, 1962 Term, 77 Harv.L.Rev. 62, 143 (1962), we must reverse the district court's finding of waiver.

At the oral argument, respondent called our attention to an alternative ground of waiver, not decided by the district court, namely a decision by the Maine court that by failing to include his objection to the composition of the jury in his original appeal, petitioner lost the right to raise it collaterally. *Mottram* v. *State*, 263 A.2d at 725. The court's ruling does not preclude petitioner from raising the issue by a federal habeas petition. There is no evidence to suggest that his failure to raise the jury issue on appeal was anything but inadvertent, and a federal constitutional right cannot be waived by simple inadvertence. *See Frazier* v. *Roberts*, 8 Cir., 1971, 441 F.2d 1224, 1230; *Farrant* v. *Bennett*, S.D. Iowa, 1966, 249 F.Supp. 549, *cert. denied* 384 U.S. 965; *cf. Hunter* v. *Warden*, 4 Cir., 1964, 335 F.2d 936. Indeed, the state court itself found waiver only because it viewed the matter as a mere trial irregularity. *Compare* 263 A.2d at 725, *with Bennett* v. *State*, 1965, 161 Me. 489, 214 A.2d 667; *Papolas* v. *State*, Me., 1967, 235 A.2d 533. Since we view it as being of constitutional magnitude, see post, we cannot be precluded from reviewing it on habeas because of a state

rule, the soundness of which we do not question, that mere trial irregularities are waived if not raised on appeal.

Turning to the merits of the repeating jurors matter, we need not quarrel with respondent's contention that the state could have tried both counts of petitioner's indictment simultaneously.[5] *Spencer* v. *Texas*, 1967, 385 U.S. 554. *But cf. Cross* v. *United States*, D.C.Cir., 1964, 335 F.2d 987, where defendant wished to testify as to one count, but not as to the other. However, that is not, as the district court thought, the end of the case. Having granted his motion for separate trials, the court could not thereafter change the rules in such a way as to cause defendant prejudice. Permitting four jurors to sit on both trials created such a likelihood of prejudice to the petitioner as to deny him due process. *Cf. Leonard* v. *United States*, 1964, 378 U.S. 544.

The first source of prejudice was that the four jurors heard evidence in the first trial which they were not entitled to hear in the second. *Cf. Lett* v. *United States*, 8 Cir., 1926. 15 F.2d 690. In the first trial, petitioner having testified on his own behalf, the court properly allowed the state, in an effort to impeach his credibility, to cross-examine him as to several prior convictions. In the second trial, since he did not take the stand, the prior convictions, except the 1952 conviction to which he refused to testify, were not admissible. Yet the four jurors, who might naturally be expected to tell the others, knew of them. Knowledge of these convictions would have been prejudicial in any case. It was particularly so when the jury was considering whether, albeit by reason of another conviction, petitioner was a recidivist.

Even more strikingly prejudicial was the four jurors' knowledge that petitioner, when asked specifically about the 1952 conviction during the first trial, had refused to answer,

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[5] Separate trials are now legislatively required, 15 Me.Rev.Stat. § 1742, but were not then. *See Stubbs* v. *State*, Me., 1968, 243 A.2d 57.

claiming the Fifth Amendment. Knowing that he properly could, and probably would, claim the Fifth Amendment as to the 1952 conviction, it was error, though probably not so prejudicial as to require reversal, for the prosecutor to have asked the question on the first trial.[6] *See Namet* v. *United States,* 1963, 373 U.S. 179; *Fletcher* v. *United States,* D.C. Cir., 1964, 332 F.2d 724. Even if the previous questions were entirely proper when first asked, it is elementary that a defendant may not be impeached by showing that he had previously taken the Fifth Amendment when asked similar questions. The possibility of prejudice is too great to justify even such limited use. *Grunewald* v. *United States,* 1957, 353 U.S. 391; *Stewart* v. *United States,* 1961, 366 U.S. 1. The district court's citation of *Griffin* v. *California,* 1965, 380 U.S. 609, is beside the mark. It is even more serious to let the jury on the second trial know through the back door that petitioner had claimed the Fifth Amendment with respect to the very event then in issue. When knowledge of his pleading the Fifth Amendment comes to the jury sub rosa, the defendant loses the benefit of even a protective instruction by the court. *Cf. United States* v. *English,* 3 Cir., 1969, 409 F.2d 200. It follows that by changing the rules in the middle of the game the court placed petitioner in a worse position than if it had denied his motion for separate trials in the first place. Respondent's argument that he was not prejudiced is untenable.

The judgment is reversed, and the court is directed to grant the writ unless the petitioner is admitted to bail or retried within a reasonable time if he is presently incarcerated under this sentence.

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[6] Petitioner's affirmative answer to this question would have solved the state's problems on the second count, it being the law of Maine that a record of a conviction needs some identification other than an identity of names. *State* v. *Mottram,* 1959, 155 Me. 394.

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§ 5502. Post-conviction habeas corpus

Any person convicted of a crime and incarcerated thereunder including any person committed as a juvenile offender, or released on probation, or paroled from a sentence thereof, or fined, who claims that he is illegally imprisoned, or that there were errors of law of record, of that his sentence was imposed in violation of the Constitution of the United States or of this State, or that there were errors of fact not of record which were not known to the accused or the court and which by the use of reasonable diligence could not have been known to the accused at the time of trial and which, if known, would have prevented conviction, may institute a petition for a writ of habeas corpus seeking release from an illegal imprisonment, correction of an error of law of record, or to set aside the plea, conviction and sentence, provided that the alleged error has not been previously or finally adjudicated or waived in the proceeding resulting in the conviction or in any other proceeding that the petitioner has taken to secure relief from his conviction.

The remedy of habeas corpus provided in sections 5502 to 5508 is not a substitute for nor does it affect any remedies which are incidental to the proceedings in the trial court, or any remedy of direct review of the sentence or conviction but, except as otherwise provided in sections 5502 to 5508, it comprehends and takes the

place of all other common law remedies which have heretofore been available for challenging the validity of a conviction and sentence and shall be used exclusively in lieu thereof. A petition may be filed at any time after the criminal conviction is final.

§ 5507. Waiver of grounds not claimed; effect of prior petition of coram nobis or error

All grounds for relief claimed by a petitioner under this remedy must be raised by a petitioner in his original or amended petition, and any grounds not so raised are waived unless the State or Federal Constitution otherwise requires or any justice on considering a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition. A petitioner who has previously entered a petition under the Revised Statutes of 1954, chapter 126-A or under chapter 129, sections 11 and 12 shall not be granted the writ under this remedy unless the court on considering the petition finds grounds for relief asserted therein which could not reasonably have been raised in said previous petition.

CERTIFICATE OF SERVICE

Pursuant to the Rules of the Supreme Court of the United States, the undersigned, counsel of record for the petitioners, on the date written below, did deposit a copy of the above petition for a Writ of Certiorari in the United States Post Office at Augusta, Maine, first class postage prepaid, addressed to Respondent's attorney as follows: S. Mason Pratt, Esquire, One Monument Square, Portland, Maine 04111

Dated: July 5, 1972.

John W. Benoit, Jr.

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